APPLICATION OF

GTE COMMUNICATIONS CORPORATION OF VIRGINIA **CASE NO. PUC980080**

For a certificate of public convenience and necessity to provide local exchange telecommunications service

HEARING EXAMINER'S RULING

September 24, 1998

By Ruling dated September 17, 1998, GTE Communications Corporation of Virginia ("GTE-CC" or the "Applicant") was compelled to answer several outstanding interrogatories or data requests. Additional protective measures were also identified for certain information determined to be commercially sensitive. The Ruling further established a revised procedural schedule to allow the parties an opportunity to evaluate the information for which production had to be compelled and prepare their case.

On September 21, 1998, the Applicant filed a Motion for Modification and Clarification of Hearing Examiner's Ruling. Therein, the Applicant advises that it "regrets the need to file this Motion, but does so with the hope that it will resolve several apparent misunderstandings and allow all parties to conclude discovery and proceed with the merits of the case." (Motion at 1). Applicant goes on to claim that "it is apparent from the September 17 Ruling that the scope of discovery objections ripe for resolution at the time was, at best, unclear." (Id.). Put simply, GTE-CC now claims that it was unaware that relevancy issues were to be addressed during oral argument. Applicant also seeks an extension of the time to provide a required certificate concerning the completeness of the responses. By separate cover, the Applicant produced the three documents specifically discussed at the September 16, 1998 oral argument pursuant to the protective measures established in this case.

Cox Virginia Telcom, Inc. ("Cox") immediately filed its Opposition to Motion of GTE Communications Corporation of Virginia, also on September 21, 1998. Cox asserts that there was not any "confusion" about the scope of the oral argument or the issues before the Examiner for resolution. AT&T Communications of Virginia ("AT&T") filed its Answer to the Motion on September 22, 1998, also alleging that "the only misunderstanding, lack of clarity, miscommunication or confusion is on the part of GTE-CC itself." (AT&T Answer at 2).

Continuing the barrage of pleadings on issues already decided, Applicant filed a Supplemental Motion for Modification and Clarification of Hearing Examiner's Ruling and

Motion for Partial Stay on September 22, 1998. Applicant requests a temporary stay of the provisions that compel GTE-CC to answer interrogatories to which Applicant has objected, and relief from the requirement that in-house counsel provide a certificate regarding the completeness of the discovery search. Applicant now admits that it "believes there are inaccuracies in the record which it regrets." In fact, it admits that there "are, and always have been 'proprietary, confidential, competitively sensitive or trade secret' documents other than those discussed in the hearing last week." (Supplemental Motion at 2, Affidavit). GTE-CC now asks to make an offer of proof that these documents are so sensitive that they cannot be disclosed, even under the terms of the protective order. Applicant requests an opportunity to argue that any marginal relevance of the additional information outweighs the competitive prejudice to GTE-CC.

On September 23, 1998, AT&T filed an Answer to the Supplemental Motion. AT&T argues that nothing has changed to warrant having another hearing to examine issues that have already been heard and decided.

Upon receipt of the Motion for Modification and Clarification, I reviewed the September 14 Ruling denying blanket immunity from information production, the motions to compel, the back-up tapes from the September 16 oral argument, and the September 17 Ruling on the motions to compel. The scope of the oral argument and the issues before me were extremely clear and repeatedly articulated.

The Applicant's claim that it or I "misunderstood" is illogical. The relevance of the information sought has been repeatedly discussed and argued. It should have come as no surprise that a determination on relevance was not only ripe, but critical. In the September 14 Ruling, the parameters for discovery were discussed explicitly. Therein, it was stated that discovery rulings, as always, begin with a broad threshold determination as to whether information sought is **relevant** to the subject matter involved in the case. If the information is not relevant, its production will not be compelled.

Upon denying the blanket immunity from discovery sought by the Applicant, the September 14 Ruling endeavored to quickly resolve all outstanding discovery disputes by directing that "any outstanding discovery disagreements should be clearly articulated in Motions to Compel. . . ." (Ruling at 3). Oral argument was immediately scheduled on those motions. Thus all parties were afforded an opportunity to offer their positions to facilitate a determination on whether the interrogatories should be answered. The discovering party was required to establish why a particular question should be answered which, of course, as repeatedly noted, starts with a showing of **relevance**. The producing party is expected to show why the question need not be answered. That may involve a showing that the information sought is not relevant, privileged, is so commercially sensitive as to outweigh relevancy, or any other reason the producing party chooses to raise. The purpose and scope of the September 16 oral argument was to resolve all outstanding interrogatory disputes, or more simply stated, to determine if answers should be produced or not.

Cox, AT&T and MCI fully understood, and filed motions to compel answers specifically identifying the questions for which they sought answers. In their motions, AT&T and MCI also argued the **relevance** of the information sought. (AT&T Motion at 2-4, and MCI Motion at 2-3).

At the beginning of the oral argument, I again advised all parties that "I will need to evaluate the **relevance** and sensitivity of each interrogatory." (Tape[1] at 260). Moreover, I specifically advised counsel for GTE-CC that "Mr. Clarke,. . .I expect you to show me why the information sought is not **relevant** or is so commercially sensitive that the Applicant should not be required to produce it." (Tape at 270-279).

Counsel for GTE-CC went on to advise the Examiner that "we think that based on the internal review by in-house counsel to the Applicant, that there are a very limited number of documents that would be responsive to the many data requests that individually are in dispute and if you might consider looking at the larger issue we can avoid going interrogatory by interrogatory. . . ." (Tape at 330-356). Counsel went to explain that it was "important to note that on information and belief. . .in reliance on the personal review by in-house counsel for the Applicant, that. . .within the universe of documents that are potentially responsive to the data requests and interrogatories, all of the responsive documents have either been produced or are privileged with the exception of two documents that have been previously provided to the Staff under seal and a third document which only today we have redacted from an internal communication to exclude privileged communications." (Tape at 367-388).

GTE-CC thus advised this Commission that "within the universe of documents that are potentially responsive to the data requests. . .all have either been produced or are privileged except" three. Based on that representation the arguments focused on those three documents. (Id.).

GTE-CC went on to acknowledge that "we have a disagreement over whether merger information is **relevant** and necessary to this proceeding. . . perhaps we could deal with that issue with regard to that one document that we do have that would be responsive." (Tape at 410-425). As clarification, counsel was asked "I am assuming you are not questioning the **relevancy** of two documents but you may be questioning the **relevance** of the third?" (Tape at 430-434). In response, Applicant advised that indeed it questioned the "**relevance** of the third document [the merger information]. . .I think we are questioning the **relevancy** of the roll-out plan, but we have other arguments that may be more persuasive." (Tape at 440-450). Counsel for GTE-CC specifically addressed why he thought the information set forth in each document was not **relevant** to this case. Concerning the financial information of GTE Communications, counsel advised that the information was not **relevant** because Applicant was relying on the financial strength of GTE Corporation to satisfy the requisite financial findings. (Tape at 459-475).

Turning to the roll-out plan, the Applicant again argued its **relevance**. Counsel for GTE-CC advised that it was "highly sensitive" and further opined that he "could conceive of

[1]All references to the back-up tapes from the September 16 oral argument will be referred to as "Tape at __." The tape location references are approximate and may vary with different audio players.

no plausible need for Protestants to have this information in connection with preparing their case. . .it is not necessary." (Tape at 505). Addressing the merger information, the Applicant advised that "that information is not **relevant** to a CLEC application." (Tape at 522). Moreover, counsel was specifically asked "AT&T alleges it is **relevant**. . .how do you respond to that?" (Tape at 541).

Each Movant Protestant, in turn, also addressed the **relevance** of the information sought. (Tape at 948 – 1300).

For Applicant to now claim that it believed the purpose of the oral argument was solely to address issues related to the confidential and/or proprietary nature of the requested information and not its relevancy or any other objection is absurd. Protective provisions had already been established in the September 14 Ruling. Moreover, that "claim" completely ignores the arguments that took place on September 16 with counsel for GTE-CC present. Every pleading and every argument offered was clearly intended to resolve "outstanding discovery disputes." Relevance was addressed. Privileged documents were addressed. Confidential concerns were addressed. Any other objections to answering clearly identified interrogatories could have, and should have, been addressed at the September 16 oral argument.

Good cause does not exist to reconvene an oral argument to hear all the arguments Applicant could have, and should have, made prior to disposition of the outstanding discovery disputes. I share Applicant's regret that it needed to file these motions. This round of motions appears to be an attempt to further delay and frustrate the parties' abilities to prepare their testimony in this proceeding. While future and legitimate discovery disputes or other pretrial matters may arise which fall within the scope of the authority assigned to the Examiner in this case, the Applicant must be advised that any further actions taken by GTE-CC which delay preparation of the testimony of Protestants or the report to be filed by Staff will affect the procedural schedule of this case. Further, Applicant should be mindful that the Commission has the authority to impose sanctions on parties if circumstances warrant. Accordingly,

The Motion for Clarification and Modification is **DENIED**.

The Supplemental Motion for Modification and Clarification and Motion for Stay is **DENIED** in part, and **GRANTED** in part. GTE-CC in-house counsel is excused from filing the certificate required by the September 17 Ruling since she has now offered an affidavit that the three documents identified as the only ones responsive to the outstanding and disputed data requests are not "the only documents in the universe of documents responsive to the data requests" at issue. However, since the other responsive documents have been in existence, I find no cause exists to stay the provisions of the September 17 Ruling that compel GTE-CC to answer interrogatories. I recognize that a very short period was allowed for production, based on GTE-CC's representation that only three documents were responsive. Therefore, I will modify the schedule for production. Further, I will provide for my in camera review of only those documents for which GTE-CC believes production, even under the protective provisions set forth in the September 14

Ruling, would be so injurious as to outweigh their relevance. Finally, since GTE-CC has waited to reveal that the universe of responsive documents is greater than it earlier advised the Commission, the additional delays will affect the procedural schedule. Accordingly,

IT IS DIRECTED:

1) That GTE-CC in-house counsel who conducted the document search for discovery in this case is relieved from the requirement to file a certificate verifying that no other documents are responsive to outstanding interrogatories;

2) That, on or before September 28, 1998, GTE-CC answer the following interrogatories:

a. Cox Virginia Telecom, Inc.'s Second Set of Interrogatories and Requests for Production of Documents, dated August 11, 1998:

Questions 6(a), (c), & (d) (p. 7);
Question 8(b) (p. 8);
Question 9(e) (p. 8); and
Question 30(a) & (b) (p.12).

b. Cox Virginia Telecom, Inc.'s Third Set of Interrogatories and Requests for Production of Documents, dated August 12, 1998:

Question 38 (p. 7); and
Question 44 (c) (p. 9).

c. AT&T-VA data request dated August 12, 1998, Question 3.

d. MCI Data Request # 1, Question 16.

Provided, however, if the in camera review of the hearing examiner is sought prior to production, the documents shall be produced to the hearing examiner for such review on or before September 28, 1998 at noon;

3) That, on or before October 8, 1998, each Protestant shall file with the Clerk of the Commission an original and twenty (20) copies of the prepared testimony and exhibits the Protestant intends to present at the hearing, and shall on the same day, mail a copy of the prepared testimony and exhibits to counsel for GTE-CC and other Protestants;

4) That the Commission Staff shall analyze the reasonableness of GTE-CC's application and present its findings in a Staff Report to be filed on or before October 21, 1998;

5) That, on or before October 21, 1998, if necessary, the Commission Staff may file with the Clerk of the Commission an original and twenty (20) copies of any prepared testimony and exhibits it intends to present at the public hearing. A copy of the Staff's direct testimony shall be mailed to counsel for the Applicant and to each Protestant;

6) That, on or before October 28, 1998, the Applicant shall file with the Clerk of the Commission an original and twenty (20) copies of any testimony it expects to introduce in rebuttal to any direct prefiled testimony of Staff and Protestants. A copy of the rebuttal testimony shall be mailed to Staff and each Protestant by overnight delivery;

7) That a public hearing, for the purpose of receiving prefiled testimony and the Staff Report, and cross-examination thereon, will be held in the Commission's 2nd Floor Courtroom at 11:00 a.m. on November 5, 1998; and

8) That the hearings previously scheduled for October 21 and November 3, 1998, are hereby cancelled.

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Deborah V. Ellenberg
Chief Hearing Examiner